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No. 1500

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

COLUMBIA VALLEY RAILROAD COMPANY,
Appellant,

vs.

PORTLAND AND SEATTLE RAILWAY COMPANY,
Appellee.

Appellee's Brief.

Appeal from Circuit Court for Western District of Washington.

CHARLES H. CAREY and
JAMES B. KERR,
Counsel for Appellee.

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STATEMENT.

This is an appeal by the Columbia Valley Railroad Company from a decree of the circuit court of the United States, for the western district of Washington, dismissing the bill brought by the appellant against the Portland and Seattle Railway Company.

The history of the litigation in the circuit court is that on February 2, 1906, the complainant filed its bill in the circuit court, and thereafter and on February 23, 1906, a demurrer to the bill was sustained (Trans. p. 1,

p. 26). Thereupon and on March 28, 1906, the complainant filed an amended bill of complaint (Trans. p. 27), and on September 8, 1906, a demurrer was sustained to the amended bill (Trans. p. 94). The complainant then filed a second amended bill of complaint (Trans. p. 95), and on November 14, 1906, an order was entered striking from the files the second amended bill, for the reason that it was filed without leave of court (Trans. p. 143). The court then, on application, granted leave to refile the second amended bill (Trans. p. 144), but on the same day the demurrer of the defendant to the second amended bill was sustained (Trans. p. 148). A decree dismissing the cause was entered February 11, 1907 (Trans. p. 149).

The original bill alleged that the complainant was a railroad corporation organized and existing under the laws of the state of Washington, and that the defendant was a railroad corporation organized under the laws of the same state; that the complainant claimed a right of way over certain public lands of the United States under the provisions of the act of congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States." The provisions of this act are set out at length, and the bill alleges in detail the performance by the complainant of the things required by the act to acquire a right of way, namely, the filing of a certified copy of its articles of incorporation with the secretary of the interior, the making of a survey, preparation of maps showing the surveyed line of the pro-

posed road of complainant, and the approval by the secretary of the interior of the proofs and maps so filed in the year 1899.

The bill alleges that at the various times therein mentioned, certain lands described by government subdivisions were public lands of the United States, and that by virtue of the matters set forth in the bill the complainant became the owner of a right of way 200 feet wide over and across such subdivisions. It is alleged that in the year 1905 the defendant, without the consent of the complainant, entered upon certain of the premises described in the bill, and under a pretense of ownership undertook to construct thereon a railroad. The bill prayed that the defendant be enjoined from occupying the premises and from constructing its railway thereon.

The demurrer which was sustained to this original bill specified that the bill did not state facts which entitled the complainant to relief, and that the court was without jurisdiction of the cause.

The second amended bill of complaint (Trans. p. 27) is substantially identical with the original bill, except that it undertakes to set forth at length by specific averments the title under which the defendant claims the right to enter upon the premises. For example: It alleges that as to one tract the defendant claims that one Heinrich Kapp claims to have acquired title to a government subdivision under the act of congress of June 3, 1878, commonly called the timber and stone act, but after the compliance by the complainant with the

act of March 3, 1875, and has undertaken to convey to the defendant a right of way across said premises: that as to other tracts, the defendant claims that the Northern Pacific Railway Company as successor of the Northern Pacific Railroad Company, selected the land under a certain act of congress of July 1, 1898, and has attempted to convey to the defendant a right of way across such premises. The amended bill concludes with the same prayer as the original bill.

Although the circuit court sustained a demurrer to the original bill, upon the ground that it presented no case within the jurisdiction of the circuit court, nevertheless the memorandum opinion, filed in support of the decision sustaining the demurrer to the amended bill, holds that a case was presented involving a federal question, but the demurrer was sustained upon the ground that the complainant had an adequate remedy at law.

After the demurrer was sustained to the amended bill of complaint, the second amended bill of complaint was filed as above stated. This bill was identical with the first amended bill, except in this, that the second amended bill contained an allegation that the "complainant was at the time of the institution of the suit and is now in the actual possession of a right of way over a portion of the land described in the bill, and is and has been for some time prior hereto, actually and actively engaged in the building and construction of a grade for its railroad thereon."

The demurrer to this bill was sustained without the filing of an opinion.

ARGUMENT.

The first inquiry is whether such a case was made by either of the bills as presented a cause within the jurisdiction of the circuit court. Considering first the original bill, it is clear that no claim of jurisdiction can be made except upon the ground that the bill presents a case requiring the construction of the constitution, laws or treaties of the United States, for the reason that it appears upon the face of the bill that both the complainant and the defendant are Washington corporations and, therefore, diversity of citizenship does not exist. It is obvious that the circuit court was right in sustaining the demurrer to the original bill, because it did not appear from its averments that a decision of the controversy which was presented required a construction of an act of congress. It was argued in the court below, and will be argued here, that the fact that the bill deraigned title to the land in controversy under the right of way act of March 3, 1875, is sufficient to present a federal question, but the authorities do not sustain this view, and the circuit court was clearly right in sustaining the demurrer to the bill as originally drawn. The allegations of this bill in effect are that the complainant claims to be the owner of a strip of land 200 feet in width by virtue of having complied with the act of March 3, 1875. The fact that title is deraigned under an act of congress, however, by no means presents a case which necessarily requires a construction of such act. Notwithstanding the averments of the bill, it might well appear upon the trial of the

cause that the defendant (a) denied the allegation that at the time of the survey by the complainant the lands in controversy were public lands of the United States, or (b) that the defendant held a deed of conveyance from the complainant of the right of way in question, or (c) that the defendant was admittedly a naked trespasser. If any of these facts appeared upon the hearing, no construction of the act of March 3, 1875, would have been involved and the court would have had no occasion to construe an act of congress. The authorities fully sustain the circuit court in its action in sustaining the demurrer to the original bill.

In Third Street etc., Railway Company vs. Lewis, 173 U. S. 457, the court said:

> "It is thoroughly settled that under the act of August 13, 1888, the circuit court of the United States has no jurisdiction, either original or by removal from a state court, of a suit as one arising under the constitution, laws or treaties of the United States, unless that appears by the statement of the plaintiff to be a necessary part of his claim."

In Blackburn vs. Portland Gold Mining Company, 175 U. S. 571, the facts were as follows:

Blackburn, a citizen of Colorado, brought the action in the circuit court of the United States for the district of Colorado against the Portland Gold Mining Company, an Iowa corporation, and one Stratton, a citizen of Colorado. Blackburn and Stratton being

both citizens of Colorado, the jurisdiction could only be sustained if the case made by the complaint required a construction of the laws of the United States.

The suit was brought under sections 2325 and 2326 revised statutes of the United States, authorizing a suit to determine adverse claims to mining claims.

The complaint alleged that Stratton had applied for a patent on a certain mining claim, and that the plaintiff Blackburn had filed his adverse claim and protest against the allowance of Stratton's application upon the ground that he, Blackburn, was the owner of the claim so applied for. The complaint alleged that Stratton had sold his interest to the Portland Gold Mining Company, and for that reason it was made a party.

The court held that no federal question was presented and dismissed the case for want of jurisdiction. This conclusion was reached largely upon the authority of Little New York Gold Washing and Water Co. vs. Keyes, 96 U. S. 199, from which the court quoted as follows:

> "In this petition the defendants set forth their ownership, by title derived under the laws of the United States, of certain valuable mines that can only be worked by the hydraulic process, which necessarily requires the use of the channels of the river and its tributaries in the manner complained of; and they allege that they claim the right to this use under the provisions of certain specified acts of congress. They also allege that the action arises under, and that its

determination will necessarily involve and require the construction of, the laws of the United States specifically enumerated, as well as the pre-emption laws. They state no facts to show the right they claim, or to enable the court to see whether it necessarily depends upon the construction of the statutes. * * * The statutes referred to contain many provisions; but the particular provision relied on is nowhere indicated. A cause cannot be removed from a state court simply because, in the progress of the litigation, it may become necessary to give a construction to the constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the constitution or laws upon the facts involved. Before, therefore, a circuit court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record, by a statement of facts 'in legal and logical form', such as is required in good pleading. * * * that the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends upon the construction or effect of the constitution, or some law or treaty of the United States."

See also

Shoshone Mining Company vs. Rutter, 177 U. S. 505.

Joy vs. St. Louis, 201 U. S. 332.

If the contention of the complainant is correct, that it was the owner of the strip of land described in the bill, the only allegation necessary to admit the proof essential to the establishment of its claim was an averment that it was the owner of the premises in controversy. It is only where an equitable title is involved that it is necessary to plead at length the facts upon which the title rests, but where a legal title is involved, it is sufficient for the complainant to allege that it is the owner, and this will permit proof of any facts which are sufficient to create a legal title. If an individual holds a patent acquired through a compliance with the homestead law, it is unnecessary to allege the performance of all the steps culminating in the issuance of the patent, for the law is satisfied with the simple allegation that the plaintiff is the owner.

As stated above, the only respect in which the first amended bill differs from the original bill is in the allegations deraigning the supposed claim of title of the defendants, but it has been settled beyond controversy by the supreme court that if a statement of the complainant's title does not present a federal question so as to confer jurisdiction upon the circuit court of the case as one involving a construction of an act of congress, the jurisdiction cannot be aided by any allegations as to the claims of the defendant.

In Boston and Montana etc. Milling Company vs. Montana Ore Purchasing Company, 188 U. S. 639, the facts were as follows: The complainant filed its bill in the circuit court of the United States for the district of Montana, alleging that it was the owner of certain mining grant called the Penn. Lode mining claim, lot No. 172, and that its title was derived from a mineral patent issued by the United States, April 9th, 1886. The bill then averred that on April 1st, 1895, the defendants wrongfully entered upon complainant's premises, and from that time on extracted from the mine large quantities of valuable ores, and that they continued to extract and mine ores and threatened to so continue unless enjoined.

For the purpose, as the bill alleged, of showing the jurisdiction of the circuit court, it was further averred that the defendants owned certain properties called the Rarus Lode Claim, No. 179, and the Johnstown Lode Claim, lot 173, and the Little Ida Lode Claim, lot 126, which claims adjoined the lode claims of complainant. The bill further averred that various claims which were and would be made by defendants as to their rights in complainant's mine by reason of their ownership of the other mines above mentioned were without foundation, yet they would be urged as a defense to the bill, and the claims of the defendants were denied and disputed, as were also the facts upon which the defendants based their defense. The bill alleged that defendants claimed that the complainant could not obtain relief for the ores abstracted within that portion

of the premises owned by it without first showing that the apices of the veins from which the ores were extracted were within the surface lines of the ground owned by complainant, whereas complainant claimed that *prima facie* it was the owner of all ores found within its boundaries extended downward into the earth until it was shown that some other person had some right thereto by reason of ownership of the apex of the vein within some other claim.

The bill further alleged that because of these disputes between the parties, the controversy required the construction of the statutes and mining regulations of the United States and, therefore, presented a federal question.

The defendants answered the bill and denied, for the purposes of the case in question, that it made or intended to make the claims set out in the bill.

Upon this record, the supreme court held that no controversy was presented arising under the laws of the United States. The court held that the averments in the bill as to the claims of defendants were unnecessary to a statement of the complainant's cause of action, and that being unnecessary, they must be rejected as surplusage, and that the complainant could not be permitted to create a controversy within the jurisdiction of the circuit court by anticipating the defendant's defenses.

The complainant urged upon the argument that the allegations as to the claim of title of defendant were properly included in the bill, because it was a bill to

quiet title and a statement of the nature of defendant's claim being essential in a bill to quiet title, the allegations were properly included. The court held, however, that the bill was one merely to enjoin trespass and not to quiet title, and that the statement of defendant's claim had no place in the bill.

In the decision by this court in Montana Ore Purchasing Company vs. Boston and Montana etc. Mining Company, 93 Fed. Rep. 274, 279 (affirmed by the decision of the supreme court above referred to), the language of Judge Caldwell in City of Fergus Falls vs. Fergus Falls Water Company, 72 Federal Rep. 873, following the doctrine of Tennessee vs. Union Planters Bank, is quoted:

> "The averments of the complaint beyond those which state a cause of action upon the contract in suit are mere surplusage. When the statement of the plaintiff's cause of action in legal and logical form, such as is required by the rules of good pleading, does not disclose that the suit is one arising under the constitution or laws of the United States, then the suit is not one arising under that constitution or those laws and the circuit court has no jurisdiction."

All the considerations above suggested apply with equal force to the second amended bill, and it is submitted that no case is made by this bill when tested by the rules laid down by the supreme court as one involving the construction of an act of congress so as to be within the jurisdiction of the circuit court.

But if there be any doubt in this regard, it is clear that no case was presented by the second amended bill for an injunction against the defendant. The demurrer was properly sustained upon the merits.

The suit was commenced February 2, 1906, and the second amended bill was filed November 14, 1906. The act of March 3, 1875, by section 4, provides that if any section of a road located under the provisions of the act shall not be completed within five years after the location of such section "the rights herein granted shall be forfeited as to any such uncompleted section of said road." It appears, therefore, that more than five years had elapsed between the location of the Columbia Valley Railroad Company, which took place in 1899 according to the averment of the bill, and the time of the commencement of the suit. It may be conceded however, for the purposes of this case, that if the act of March 3, 1875, vests the fee to a strip of land 200 feet wide in a railroad company as the grantee and beneficiary under that act, the provision above quoted is in the nature of a condition subsequent, and the title to such strip will not revest without legislative action by congress sufficient to indicate an intention to take advantage of the breach of the condition and thereby enforce the forfeiture. It may be observed, however, in passing, that if the act of March 3, 1875, only operates to grant an easement or a right to acquire a right of way by construction, it may well be held that the lapse of time, without congressional action, is sufficient to extinguish the right.

See

Alling vs. Railway Company, 99 U. S. 463.

Smith vs. Townsend, 148 U. S. 490.

Pensacola etc. Rd. Co., 19 Land Dec. 386.

Brucker vs. Buschmann, 21 Land Dec. 114.

But it appears that after the commencement of the suit, and before the filing of the second amended bill, congress did enforce the forfeiture by the passage of an act approved June 26, 1906, entitled "An act to declare and enforce the forfeiture provided by section four of the act of congress approved March third, eighteen hundred and seventy-five, entitled 'An act granting to railroads the right of way through the public lands of the United States.'"

This act is as follows:

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled: That each and every grant of right of way and station grounds heretofore made to any railroad corporation under the act of congress approved March third, eighteen hundred and seventy-five, entitled 'An act granting to railroads the right of way through the public lands of the United States,' where such railroad has not been constructed and the period of five years next following the location of said road, or any section thereof, has now expired, shall be, and hereby is, declared forfeited to the United States, to the extent

of any portion of such located line now remaining unconstructed, and the United States hereby resumes the full title to the lands covered thereby freed and discharged from such easement, and the forfeiture hereby declared shall, without need of further assurance or conveyance, inure to the benefit of any owner or owners of land heretofore conveyed by the United States subject to any such grant of right of way or station grounds; *provided*, that in any case under this act where construction of the railroad is progressing *in good faith* at the date of the approval of this act, the forfeiture declared in this act shall not take effect as to such line of railroad."

Although this act above quoted was passed *pendente lite*, it must be read as part of the act under which the complainant claims title to the premises in question, and unless the bill contains sufficient averments to show a title in the complainant, notwithstanding the provisions of the act as amended, it must be held to show no ground for relief. This is well illustrated by the decision of the supreme court in United States vs. Winona and St. Peter Railway Company, 165 U. S. 463-476. That was a suit in equity brought by the United States to recover lands alleged to have been erroneously certified to the state of Minnesota for the benefit of the defendant railroad company, and by it sold to various purchasers. After the decree in the circuit court, congress passed the act of

March 2, 1896, confirming the titles of bona fide purchasers, defining them, as held by the supreme court, as persons who purchased without actual notice of defects in their title. The supreme court, in considering the case on appeal from a decree setting aside the certification, held that the rights of the parties must be measured by the law as it existed when the appeal was heard, and that inasmuch as congress had confirmed the titles of the defendant purchasers, although after the institution of the suit, the decree cancelling the titles must be reversed and the intention of congress given effect even as to the pending litigation. It results, therefore, that in the present case unless the second amended bill contains sufficient averments to protect the complainant against the forfeiture declared by the act of June 26, 1906, it is bad upon demurrer. It will be observed that congress declared a forfeiture as to all such titles as those claimed by the complainant save and except in those cases where it appeared that on June 26, 1906, the grantee under the act of March 3, 1875, which had allowed more than five years to elapse after the location of its line, was engaged in the construction of its railroad in good faith. The only allegation in the second amended bill with reference to the construction of the complainant's road is that the complainant "is now (November 14, 1906) and has been for some time prior hereto, actually and actively engaged in the building and construction of a grade for its railroad therefor and thereon."

It therefore appears that the second amended bill

fails to state any fact which relieves the complainant from the operation of the forfeiture declared by the act of June 26, 1906, and it therefore has no title to the premises in question.

Some point is attempted to be made by the complainant that the enforcement of a forfeiture cannot be made by act of congress, but only by judicial proceeding authorized by act of congress.

The argument of the appellant is, if we rightly understand it, that because the practice usually resorted to at common law by the sovereign of England was of instituting a direct proceeding involving an inquiry by a jury, such a proceeding and a jury trial are essential to a resumption of title by the United States. But in this country it has been settled by the decisions of the supreme court of the United States for forty years that the legislative declaration of a forfeiture by the United States is the equivalent of an entry by an individual and has the effect to determine and revest in the United States an estate granted upon condition subsequent where the condition has in fact been broken.

At common law, a private person who was grantor of an estate upon condition was required to make a formal entry upon the premises to enforce a forfeiture. This was upon the theory that it required as solemn an act to defeat an estate as to create it. 3 Washburn's Real Property, pp. 14-18 (Fifth Ed.).

After the entry, if the possession was still withheld, the grantor had his remedy by ejectment and on the

trial of such an action the question of the breach of the condition or, if broken, its waiver was a matter of fact to be determined by the jury. Hubbard vs. Hubbard, 97 Mass. 188, and cases cited at 3 Washburn's Real Property 18.

The conclusion is that at common law where an estate was granted by a private person upon condition subsequent and the condition was broken and the grantor elected to take advantage of the breach and made an entry, the estate revested, but the facts on which the forfeiture was claimed were subject to examination in an action of ejectment; where an estate was granted by the sovereign upon condition subsequent and the condition was broken and the sovereign elected to take advantage of the breach by causing to be instituted an inquest of office as an equivalent of an entry and the fact of forfeiture was found, the estate likewise revested, subject to the right of the grantee to have the question of fact re-examined in a proceeding instituted by him. Blackstone's Commentaries, Book 111, Chap. 17.

The enforcement of a forfeiture for breach of condition both in case of the individual and the sovereign depended upon the election of the grantor and only because of the difficulties of the sovereign employing the remedies open to the subject was a different procedure required in one case than in the other.

The law with respect to the enforcement of rights of private persons who claim under forfeitures of

conditions subsequent remains substantially the same but the nature of our government renders inapplicable the rules governing the enforcement of rights by the sovereign of England.

The title of the public lands of the United States can pass only by act of congress or by proceedings authorized by congress. Furthermore there is no authority vested in any person or officer to make an entry on behalf of the United States where a ground of forfeiture exists. The result is that the determination to take advantage of such a breach must in the nature of things be made by congress. And the cases so decide.

In Schulenburg vs. Harriman, 21 Wall. 44, the court said:

> "In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate, depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one, it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement. At

common law the sovereign could not make an entry in person, and, therefore, an office found was necessary to determine the estate; but, as said by this court in a late case (United States vs. Repentigny, 5 Wall. 286), 'the mode of ascertaining or of resuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly under the authority of the government without these preliminary proceedings.'"

In United States vs. Northern Pacific Railroad Company, 177 U. S. 435-440, the court said:

"In July, 1866, congress granted unto the California and Oregon Railroad Company a right of way over the public lands. In a subsequent suit between the railroad company and one Bybee, a holder of a mining claim, it was claimed that the railroad company had forfeited and lost its right under the grant by its failure to complete its road within the time limited in the act; that such failure operated *ipso facto* as a termination of all right to acquire any further interest in any lands not then patented. But it was held by this court, in the words of Mr. Justice Brown: 'That in all cases in which the question has been passed upon by this court, the failure to complete the road within the time limited is treated as a condition subsequent, not operating *ipso facto* as a revocation of the

grant, but as authorizing the government itself to take advantage of it and forfeit the grant by judicial proceedings, or by an act of congress, resuming title to the land.' "

In Atlantic & Pacific Railroad Company vs. Mingus, 165 U. S. 413, the facts were that a grant was made by act of congress of July 27, 1866, to the railroad company of certain odd numbered sections of land, upon condition that its railroad be constructed within a certain time. A portion of the road was constructed and a portion was not constructed, and on July 6, 1886, congress passed an act declaring all lands except the right of way, "adjacent to and coterminous with the uncompleted portions of the main line of said road, embraced within both the granted and indemnity limits as contemplated" by the act of organization, to be "forfeited and restored to the public domain." After the passage of this act, the railroad company brought the action which was ejectment against Mingus, who was occupying a portion of an odd numbered section opposite an unconstructed portion of the road. The original title of the plaintiff was conceded, and the only question presented by the case was as to the validity and effect of the forfeiture act. The court sustained the act of forfeiture and said (p. 434):

"But while we think the practice of forfeiting by legislative act is too well settled to be now disturbed, we do not wish to be understood as saying that this power may be arbitrarily exercised, or that the grantee may not set up in de-

fense any facts which he might lay before a jury in a judicial inquisition. It would comport neither with the dignity of the government, nor with the constitutional rights of the grantee, to hold that the government by an arbitrary act might divest the latter of his title when there had been no breach of the conditions subsequent, or when the government itself had been manifestly in default in the performance of its stipulations. The inquiry in each case is a judicial one, whether there has been, upon either side, a failure to perform, and it makes but little practical difference whether such inquiry precedes or follows the re-entry or act of forfeiture."

See also opinion by Judge Taft rendering decision of circuit court of appeals for the sixth circuit in Iron Mountain Railway Company vs. City of Memphis, 96 Fed. 113-127.

There can be no mistaking the language of these decisions. They mean that if a grant has been made by the United States upon condition subsequent and the condition has been broken, the title may be resumed by a declaration of congress to that effect.

The point is made that because no description of the rights of way declared forfeited by the act is given, except by reference to roads not constructed within five years next following the location, and because the act by its terms does not apply to cases where the construction of the railroad is progressing in good faith, ques-

tions of fact are involved which must be determined in a direct proceeding brought for that purpose. But every legislative forfeiture must in the nature of things either prescribe or presume a fact upon which its operation depends. This is well illustrated by Farnsworth vs. Minnesota & Pacific Railroad Company, 92 U. S. 47. In this case the state of Minnesota granted to the Minnesota and Pacific Railroad Company certain lands which had been granted to the state by congress, and provided the conditions upon which the grant should be earned, and that as to the lands pertaining to portions of the road which should not be constructed within a specified time they "should be forfeited to the state absolutely, and without further act or ceremony whatever." The company, although it built portions of the road and earned certain lands, made default with respect to other portions, and the state passed an act granting to another company the lands which were subject to forfeiture. The court held this second grant to be such a declaration of forfeiture as was sufficient to divest the title of the Minnesota and Pacific Company and confer it on the second grantee. It is plain that the right to forfeit depended on the question of fact whether the conditions of the grant had been fulfilled, and the extent of the forfeiture as applying to any particular tract of land depended on the question of fact whether it pertained to a constructed or unconstructed portion of the road. The court said at p. 66:

> "A forfeiture by the state of an interest in lands and connected franchises, granted for the

construction of a public work, may be declared for non-compliance with the conditions annexed to their grant, or to their possession, when the forfeiture is provided by statute, without judicial proceedings to ascertain and determine the failure of the grantee to perform the conditions. Such mode of ascertainment and determination —that is, by judicial proceedings—is attended with many conveniences and advantages over any other mode, as it establishes as matter of record, importing verity against the grantee, the facts upon which the forfeiture depends and thus avoids uncertainty in titles, and consequent litigation. But that mode is not essential to the divestiture of the interest where the grant is for the accomplishment of an object in which the public is concerned, and is made by a law which expressly provides for the forfeiture when that object is not accomplished. Where land and franchises are thus held, any public assertion by legislative act of the ownership of the state, after default of the grantee,—such as an act resuming control of them and appropriating them to particular uses, or granting them to others to carry out the original object,—will be equally effectual and operative. It was so decided in United States vs. Repentigny, 5 Wall. 211, and in Schulenberg vs. Harriman, 21 Wall. 44, with respect to real property held upon conditions subsequent."

The court said further (p. 67):

"The only inconvenience resulting from any mode, other than by judicial proceedings, is that the forfeiture is thus left open to legal contestation, when the property is claimed under it, as in this case, against the original holders."

See also Railroad Co. vs. Mingus, 165 U. S. 413.

The point is urged by the appellant that no one but the grantor or his heirs, if he be a natural person, or the successor, if the grantor be a corporation, can take advantage of a breach of condition, that is, cannot elect to make an entry or cause an estate granted upon condition to revest. The proposition so stated is, of course, elementary, but has no application whatever to the present case. The respondent is not seeking to forfeit the estate of the appellant. That has been done by act of congress, and the same act has confirmed the title of the appellee, which was previously burdened with appellant's easement. The language is "and the United States hereby resumes the full title to the lands covered thereby freed and discharged from such easement and the forfeiture hereby declared shall, without need of further assurance or conveyance, inure to the benefit of any owner or owners of lands heretofore conveyed by the United States subject to any such grant of right of way or station grounds."

The argument of appellant, if it should prevail, would not only defeat the plain purpose of congress under the present act, but would have such a far reach-

ing effect as to unsettle titles within the limits of the multitude of railroad land grants, which have been commonly supposed to be safely forfeited many years ago for failure to construct.

The general forfeiture act of September 29, 1890, (26 Stat. 496) purports in terms similar to those of the present act to forfeit and resume the title to all lands granted to any state or corporation "to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad *not now completed and in operation* for the construction or benefit of which such lands were granted."

Upon appellant's theory, until a judicial inquiry is had in a proceeding instituted by the United States for that purpose against each railroad company affected by this act, and the determination by a jury of both the questions of fact as to construction and as to operation, the title to the vast domain included in these forfeited grants remains in the grantees. No such suits have been brought by the United States, and by appellant's argument the vast areas so forfeited still belong to the defaulting railroad companies, and the people of the prosperous communities which have sprung up on these lands are naked trespassers.

It is submitted that the decree should be affirmed.

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